IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOVACARE, INC., Plaintiff,	:	CIVIL ACTION
	:	NO. 97-5903
v.	:	
SOUTHERN HEALTH MANAGEMENT INC., n/k/a ASPEN HILLS OF HALLS FERRY, and GREENTREE NURSING CENTER, INC. Defendants.	:	

M E M O R A N D U M

BUCKWALTER, J. August 11, 1998

Before the court are Plaintiff's motion for summary judgment and Defendants' response, which is also construed as a motion pursuant to Rule 12(b)(6) for dismissal of counts three, five, seven and eight of Plaintiff's complaint ("Complaint").[1] For the reasons that follow, Plaintiff's motion will be granted, in part and denied, in part and Defendants' motion will be granted.

I. BACKGROUND

On August 15 1993, Plaintiff, NovaCare Inc., ("NovaCare") a provider of speech, occupational and physical therapy services entered a therapy services agreement with

1. Though it lacks an appropriate caption, the Clerk has docketed Defendants' response as a brief in opposition to summary judgment and a motion to dismiss counts three, five, seven and eight of Plaintiff's complaint. (Dkt. # 23)

Defendant, Aspen Hills of Halls Ferry ("Aspen" and the "Aspen Agreement"), a nursing home. On November 4, 1994 NovaCare and Defendant, Greentree Nursing Center Inc., signed a similar therapy services agreement ("Greentree" and the "Greentree Agreement"). On April 30, 1997 NovaCare terminated both agreements for Aspen's and Greentree's failure to make timely payments and thereafter instituted this action.[2] NovaCare claims it is owed $269,271.74 under the Aspen Agreement for services rendered from September 1995 through April 30, 1997 and $312,336.67 under the Greentree Agreement for services rendered from January 1996 through April 30, 1997.

As to Aspen and Greentree respectively, counts one and five are for breach of contract; counts two and six are "claims due on book accounts"; counts three and seven are for unjust enrichment; and counts four and eight are for conversion.

II. DISCUSSION

A. Legal Standards

NovaCare moves for judgment in its favor as to all counts pursuant to Federal Rule of Civil Procedure 56 (c) which provides for the entry of summary judgment when:

---

2. NovaCare initially named Southern Health Management Inc. ("Southern") as the sole defendant, under the belief that Southern did business as Greentree and Aspen. Southern provides only management, consulting and administrative functions for Greentree and Aspen; Aspen and Greentree operate as separate entities. Therefore, by stipulation Southern was dismissed.

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c).

Defendants, Aspen and Greentree, seek dismissal of NovaCare's unjust enrichment claims (counts 3 & 7) and conversion claims (counts 5 & 8) pursuant to Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted."

B. Counts 3 & 7: Unjust Enrichment

Defendants seek dismissal of counts three and seven for failure to state a claim. I will grant this request. Pennsylvania law is clear, when, as here, the parties' relationship is based on an express written contract no unjust enrichment recovery is permitted. See Schott v. Westinghouse Elec. Corp., 259 A.2d 443, 448 (Pa. 1969); Third National Bank & Trust Co. v. Lehigh Valley Coal Co., 44 A.2d 571 (Pa. 1945)(finding the doctrine of unjust enrichment inapplicable when relationship between parties founded on written agreement); Gee v. Eberle, 420 A.2d 1050 (Pa. Super. 1980)(holding that written or express contract between parties precludes a claim of unjust enrichment); Schlechter v. Foltz, 115 A.2d 910 (Pa. Super. 1955). Though, NovaCare could have chosen to plead its equitable claims of unjust enrichment as alternatives to its breach of contract

claims, Schott, 259 A.2d at 448, 449 (considering alternative claim of unjust enrichment only after finding no express binding contract between parties), in its most recent amendment it chose not to. At this point I am unwilling to allow further amendment as it is overwhelming clear that binding written agreements between the parties exist, therefore amendment would be futile. Accordingly, counts three and seven are dismissed.

C. Counts 5 & 8: Conversion

Defendants argue that NovaCare cannot maintain claims of conversion when the relief it seeks is identical to that sought under its breach of contract claims.[3] Pennsylvania's highest court has not directly addressed this issue, therefore I must forecast the position the Supreme Court of Pennsylvania would take. Clark v. Modern Group Ltd., 9 F.3d 321, 326 (3d Cir. 1993).

Conversion is the deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification. Stevenson v. Economy Bank of Ambridge, 197 A.2d 721, 726 (Pa. 1964). Courts do not require the actor to have specific intent, rather any

3. For its breach of contract and conversion claims, NovaCare seeks the amount due under the agreements together with interest, attorney's fees and costs of suit. Though NovaCare does not seek punitives, the availability of punitives for tort claims generally motivates plaintiffs to advance tort claims based on breach of contract. See e.g., Iron Mountain Security Storage Corporation v. American Specialty Foods, Inc., 457 F. Supp. 1158, 1165 (E.D.Pa. 1978).

intent to assert domain or control over the chattel that is inconsistent with the owner's right is sufficient. Schonberger v. Oswell, 530 A.2d 112, 114 (Pa. Super. 1987) (citations omitted). Money can be the subject of conversion, Pearl Assurance Co. v. National Ins. Agency, 30 A.2d 333, 337 (Pa. Super. 1943), but it must belong to the plaintiff before it can be converted. Lee Tire and Rubber Co. v. Bonholtzer, 81 Pa. D.&C. 218, 221 (1951). Thus an action for conversion will not lie where the alleged converter borrowed money even though he had an intent not to pay back the loan. Id. Nor is there conversion when money is collected to satisfy a debt. Id. But, if a plaintiff entrusts money or goods with the intent that the defendant sell or transfer the goods and give the proceeds to the plaintiff, and defendant keeps the proceeds or applies it to his own use, there has been a conversion. Id.

NovaCare claims that despite its demands for payment Defendants, Aspen and Greentree continue "to unlawfully exercise domain and control over the sums due and owing to NovaCare for Therapy Services rendered" and thereby have "wantonly and unlawfully converted the property of NovaCare." (Complaint ¶¶ 43, 44, 58 & 59). At issue is whether money owed to NovaCare under a valid agreement can be the subject of conversion. Citing Schonberger v. Oswell, 530 A.2d 112 (Pa. Super. 1987), the only analogous Pennsylvania case, NovaCare claims that Pennsylvania

does recognizes a cause of action for conversion where money is due under a valid and enforceable contract.

Schonberger entered into a consignment agreement with Oswell Enterprises to sell women's clothes. Oswell took possession of the clothes, agreed to sell them keeping a percentage of the sale price and turning the remainder over to Schonberger. When Oswell failed to pay money due under the agreement or return the clothes Schonberger filed an action for conversion. Reversing the trial court, the Superior Court held that the proceeds from the sale of goods could be the basis for a conversion action.

Schonberger is distinguished from the instant case by the fact that the contract at issue in that case was a consignment agreement. The nature of a consignment agreement is that title to the goods under consignment remains with the consignor, and does not pass until the time of sale, at which time title passes directly to the purchaser. See e.g., Blacks Law Dictionary at 278 (5th ed. 1979) (defining "consign" as: "To deposit with another to be sold . . ., whereby title does not pass until there is action of the consignee indicating sale"); Peoples Mortgage Company Inc. v. Federal National Mortgage Association, 856 F.Supp 910, 930 n.10 (E.D.Pa. 1994)(citations omitted). Thus, Schonberger had an underlying property interest in the goods under consignment, distinct from the contractual

agreement. When Oswell sold Schonberger's goods, and refused to remit proceeds of the sales, he directly converted Schonberger's titled property interest in the goods to his own use. In contrast, NovaCare's only interest in payment for its therapy services is that specifically granted by the Aspen and Greentree Agreements. See id.

Furthermore, as the parties acknowledge, at least one district court within this district, interpreting Pennsylvania law, has held that a plaintiff cannot pursue an action in conversion when, as here, the plaintiff's rights would be properly protected by a contract action seeking enforcement or damages for breach. See id. In Peoples, Peoples Mortgage Company, Inc. brought suit against Fannie Mae regarding service income due under a letter agreement between the parties. Peoples claimed that by failing to pay money due, Fannie Mae had converted its property. The court disallowed the claim finding that Peoples' rights were adequately protected by the agreement between the parties -- "[t]hus when Peoples executed the Letter Agreement, it gave up all rights to the servicing income, except insofar as such rights may be specifically provided by that agreement." Id at 929.

In disallowing Peoples' conversion claim, the court was careful to heed Pennsylvania's caution to maintain a clear line

between tort and contract claims.[4] See id. (citing Standard Pipeline Coat v. Solomon & Teslovich, 496 A.2d 840 (Pa. Super. 1985) and Glazer v. Chandler 200 A.2d 416 (Pa. 1964)). In Glazer, Pennsylvania's Supreme Court refused to allow Glazer to pursue a claim of tortious interference of contract, in the absence of third party interference, noting:

> To permit a promisee to sue his promisor in tort for breaches of contract inter se would erode the usual rules of contractual recovery and inject confusion into our well settled forms of actions. Most courts have been cautious about permitting tort recovery for contractual breaches and we are in full accord with this policy.

Id. at 417 (citations omitted).

Also declining to find a cause of action arising in tort based on defendant's alleged breach of contract, the Superior Court in Standard Pipeline noted "[w]e find no Pennsylvania authority that permits recovery in a tort action

---

4. Defendants also cite to Montgomery v. Federal Insurance Co., 836 F.Supp. 292 (E.D.Pa. 1993). In Montgomery, the insured, Montgomery brought, inter alia, a conversion action against his insurer, Federal, for "wrongfully taking for itself money of the plaintiff in the form of premiums" and for Federal's refusal to pay proceeds on Montgomery's theft claim. The court found that money Montgomery paid as premiums was the property of Federal and was not subject to a conversion action. More importantly, the court noted that Federal's refusal to pay out on Montgomery's claims was a mere failure to pay a debt allegedly owed to Montgomery and "was not intended by the courts to constitute conversion." Montgomery, 836 F. Supp. at 301. To support its finding that "courts have firmly accepted the doctrine that an action for conversion will not lie where damages asserted are essentially damages for breach of contract", however, the court in Montgomery relied exclusively on case law from other jurisdictions, and therefore provides marginal guidance for predicting how Pennsylvania's Supreme Court would rule.

. . . where the only alleged tortious act was a breach of contract" and "that existing . . . contract principles afford adequate remedies." Standard Pipeline, 496 A.2d at 843.

Presently NovaCare alleges that Aspen and Greentree failed to make timely payments in breach of their respective agreements and seeks money due under the agreements. Under the terms of the agreements it is obvious that both Aspen and Greentree are liable for unpaid services rendered by NovaCare. Thus, the basis of NovaCare's claims is the agreements themselves, which neither party dispute the validity of. Given, Pennsylvania's courts reluctance to allow tort actions to proceed when adequate remedies are available in contract I conclude that the Supreme Court of Pennsylvania would not permit NovaCare to sue in tort for conversion when its rights are adequately protected and defined by valid and enforceable written agreements. NovaCare's appropriate avenue for relief is through its breach of contract claims. "To hold otherwise would be to blur one reasonably bright line between contract and tort, and hence introduce needless confusion into the judicial process, a step that Pennsylvania's state and federal courts alike have refused to take." Stout v. Peugeot Motors of America, 662 F.Supp. 1016, 1018 (E.D.Pa. 1986)(citing Standard Pipeline and Glazer). Accordingly, NovaCare's conversion claims, counts five and eight are dismissed.

D. Counts 1 & 4: Breach of Contract

NovaCare seeks summary judgment on all of its claims, I address only NovaCare's request as it pertains to counts one and four for breach of contract. In their response to NovaCare's motion, Defendants attach accounts payable trial balances for Aspen and Greentree indicating $216,586.26 owed to NovaCare by Aspen, pursuant to the Aspen Agreement and $267,875.30 owed to NovaCare by Greentree pursuant to the Greentree Agreement. They fault NovaCare's claim for "the obvious discrepancy between what Plaintiff alleges is owed in the invoices attached to the Amended Complaint and that which is stated in the Accounts Payable record." They do not however, contest liability -- that their failure to make timely payment under the agreements constituted breach and by admitting that money is owed they have conceded as much. Thus, I will grant summary judgment on counts one and four in favor of NovaCare on the issue of liability only. Because, however, it is clear that NovaCare's and Defendants' version of the amounts owing under the agreements are not the same there exists a material issue of fact regarding damages, which precludes the entry of summary judgment on that issue.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOVACARE, INC., Plaintiff,	:	CIVIL ACTION
	:	NO. 97-5903
v.	:	
SOUTHERN HEALTH MANAGEMENT INC., n/k/a ASPEN HILLS OF HALLS FERRY, and GREENTREE NURSING CENTER, INC. Defendants.	:	

O R D E R

AND NOW, this 11th day of August 1998, upon consideration of Plaintiff's motion for summary judgment (Dkt. No. 20); Defendants' response and motion for dismissal of counts 3,5,7 & 8 of the Complaint (Dkt. No. 22) and Plaintiff's reply (Dkt. No. 23) it is hereby ordered that Plaintiff's motion is **GRANTED**, in part, and **DENIED**, in part. Accordingly, as to the issue of liability only, judgment is entered in favor of Plaintiff, NovaCare Inc. as to count one and against Defendant, Aspen Hills of Halls Ferry. Additionally, as to the issue of liability only, judgment is entered in favor of Plaintiff, NovaCare, Inc. as to count four and against Defendant, Greentree Nursing Center, Inc. It is further ordered that Defendants' motion is **GRANTED**. Accordingly, counts 3, 5, 7 & 8 are **DISMISSED**, with prejudice.

BY THE COURT:

RONALD L. BUCKWALTER, J.